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Supreme Court of the United States

October Term 1967

No. 680

BREGMAN, VOCCO AND CONN, INC.,
Petitioner,

— against —

DONALDSON PUBLISHING CO.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinions Below and Jurisdiction

The citations to the opinions below (P.A.* 1a, 9a, 18a, 19a) and the jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

1. Under the agreement dated May 15, 1928 ["the Agreement"] (R.A.* 13b, Pl. Ex. 4, R.** 101), was Walter Donaldson's relationship to the Petitioner ["the Corporation"] that of an independent contractor or an employee for hire?

2. Was the Court of Appeals precluded by Rule 52(a) Federal Rules of Civil Procedure ["the Rule"] from

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* Citations to "(P.A. a)" and "(R.A. b)" are to pages of Petitioner's and Respondent's respective appendices.

** Citations to "(R.)" are to pages of the certified record.

making a determination as to the minimum legal standard of conduct requisite to the existence of employment for hire within the meaning of Section 24 of the Copyright Act?

3. Did the Court of Appeals correctly hold that the "corporate body" provision of Section 24 of the Copyright Act is inapplicable here, where the author is specifically identified and the rights of the parties are controlled by an express written songwriter's agreement?

Statute and Rule Involved

The pertinent provisions of the Copyright Act (17 U.S.C. § 24) and the Rule are set forth in the Petition at Pages 3-4.

Statement of the Case

This is an action, originally brought in the Federal Court on the basis of diversity of citizenship, for the determination of title to the renewal copyright interest in eighty-seven (87) songs ["the Songs"] deriving from the authorship or co-authorship of Walter Donaldson ["Donaldson"], pursuant to the Agreement between Donaldson and the Corporation (the former name of which was Donaldson, Douglas and Gumble, Inc.).

The principal question of law and fact in the determination of such title is whether, under the Agreement, Donaldson's status was that of an independent contractor or that of an employee for hire. The District Court held "from an examination of the total picture of Donaldson's relationship with the corporation that he was an employee for hire within the meaning of that term in the music publishing business" (P.A. 8a).

The Court of Appeals reversed the determination as to the character of Donaldson's legal status, holding that he was "not an 'employee' in the substantial sense required by the Copyright Act" (P.A. 16a).

Background Facts

Prior to 1927, Donaldson was a very prominent and successful songwriter (R. 123-125). Walter Douglas ["Douglas"] was a sales manager (R. 196) and Mose Gumble ["Gumble"] was a professional manager in the music publishing business (R. 199). In the latter part of 1927, the three entered into negotiations for the formation of a music publishing company of which they would be equal stockholders (R. 198-200).

After numerous discussions and after having worked out their agreement among themselves, the parties consulted a prominent lawyer in the music publishing field, Nathan Burkan, Esq. (R. 198-200), whose partner, Charles Schwartz, handled the matter (R.A. 4b, R. 50-54).

The instructions to Mr. Schwartz resulted in a draft of a pre-incorporation agreement dated April 23, 1928 ["the first draft"] (R.A. 6-7b, Pl. Ex. 2, R. 100, 201). The instrument provided for the formalities of incorporation of a corporation to be known as Walter Donaldson, Inc. Music Publishers, its capitalization, the designation of corporate officers and directors, and limitations on the disposition of stock. The major portion of the agreement was, however, devoted to a statement of the rights and obligations of the three individuals in relation to the corporation to be formed.

The language of the first draft with respect to the commitments made by each of the three parties, respectively, is as follows:

> (a) "Douglas agrees to enter into the employ of the corporation . . . and he is to agree to devote himself exclusively to the rendition of his services to the corporation. He is to receive for his services $300. per week . . ." (R.A. 7b(2), ¶ 4).
>
> (b) "Gumble agrees to enter into the employ of the corporation . . . and he is to agree to devote

himself exclusively to the rendition of his services to the corporation. He is to receive for his services $300. per week . . . (R.A. 7b(2), ¶ 5).

(c) Donaldson agrees (R.A. 7b(1), ¶ 3) ". . . to enter into a contract with the corporation upon the following terms:

You [Donaldson] agree to write and compose musical works for the corporation exclusively, for a period of ten years from the date of the incorporation of the company."

The first draft also provided that ". . . in consideration of . . . making such contract," the Corporation would issue one-third of its stock to Donaldson and pay him certain royalties with respect to printed editions and mechanical reproductions of the Songs written under the contract (R.A. 7b(1), ¶ 3). No provision was made for the payment of royalties with respect to any other rights.

The rights to which the Corporation would become entitled were as follows (R.A. 7b(2)):

"All publication and mechanical reproduction rights in your musical works written and composed during the term of your contract with the corporation, shall be and vest in the corporation immediately upon the creation of such musical works by you, subject, of course, to the payment to you of the royalties above specified, and the corporation shall have the right to secure copyright in its name in all such works."

A meeting was held at which the terms of the first draft were discussed. Some five proposed changes were noted in the handwriting of Mr. Schwartz on the margin of his copy of the first draft (R.A. 4b, 6b-7b). Except as to the substance of the five marginal notes, all of which were incorporated in the pre-corporation agreement ultimately executed on May 4, 1928 (R.A. 8b-12b, Pl. Ex. 3, R. 101), no changes from the first draft were made.

The marginal note with which this litigation is most materially concerned was, in *haec verba*:

> "Drawing a/c 300. a week for 1st six months 500. a week for balance of term"

The substance of this note, which itself contained not a word referring to "employment," was embodied in the paragraph "3" of the pre-incorporation agreement in this form (R.A. 10b):

> "You shall have a drawing account against your royalties of $300. per week during the first six months of your employment, and of $500. per week during the balance of the term. The corporation shall have the right to deduct such drawings from any royalties that may have theretofore or that may thereafter accrue to you."

The language of the pre-incorporation agreement, as to each party, was incorporated virtually verbatim, in the three separate contracts subsequently executed by each of Donaldson, Douglas and Gumble, on May 15, 1928 (R.A. 13b-17b), Pl. Ex. 4, 5, 6, R. 101, 102, 103), after the incorporation of Donaldson, Douglas and Gumble, Inc. [the name Walter Donaldson not having been available (R. 203)].

The Minutes of the first meeting of the Board of Directors of the Corporation included resolutions authorizing the execution of the individual contracts by incorporating the exact terms of the pre-incorporation agreement. To the extent that the single word "employment" appeared in the pre-incorporation agreement in the context shown above, it similarly, but not otherwise, appeared in the Minutes (P.A. 24a-28a).

During the ensuing five years, Donaldson wrote, alone or with other songwriters of his choice, 87 songs, all of which were published by the Corporation pursuant to the Agreement (R.A. 2b, Pre-Trial Order, R. 50-54 and R.A. 5b, Court Ex. 1, R. 99). In each instance in which Don-

aldson composed a song without the collaboration of another songwriter, he was named in the copyright registration as the sole author. When he collaborated with another songwriter, Donaldson and the other songwriter were designated in the copyright registration as co-authors. No registration of copyright for any song composed in whole or in part by Donaldson ever gave credit to the Corporation or any arranger-employee of the Corporation as author or co-author (R.A. 5b, ¶ 1). All registrations of copyright of Donaldson's works were made by the Corporation.

Among the Songs were many written by Donaldson for use in musical stage plays and in motion pictures. Thus, within three months after the execution of the Agreement, Donaldson agreed to write the score of "Whoopee", a dramatico-musical play for the legitimate stage. He and his co-author, Gus Kahn, executed the contract in their own names, warranting the right to enter into the contract and granting exclusive rights for dramatic uses. Donaldson did provide, as required by his exclusive publishing agreement, that the Corporation would publish the music. The entire advance payment and a percentage of box office receipts of this highly successful show were paid directly to Donaldson alone (R.A. 18b-19b, Pl. Ex. 7, R. 103).

The Corporation was not a party to that agreement and it never claimed any right to the consideration for Donaldson's writing of the score. In fact, it subsequently made its own agreement with Ziegfeld under which it acquired all of the publishing rights which Ziegfeld could convey. For these rights, the Corporation paid Ziegfeld the sum of $1,000 (Pl. Ex. 8, R. 104).

In December, 1929, some 18 months after the execution of the Agreement, the same draftsman, Mr. Schwartz, as attorney for Samuel Goldwyn, prepared the agreement for Goldwyn's acquisition of the exclusive motion picture rights to "Whoopee" (R.A. 19b-22b, Pl. Ex. 9, R. 106).

By this agreement, Donaldson and his co-authors granted to Goldwyn the exclusive motion picture synchronization rights to the "Whoopee" score for both the original and renewal terms of copyright. As a co-owner, with his co-authors, of the synchronization rights, Donaldson personally was paid a proportionate share of the $50,000 fee. The Corporation was not a party to this agreement and received no part of the fee. Similarly, Donaldson and his co-writer, Gus Kahn, agreed to create additional music for the motion picture version of "Whoopee" for which each was paid, directly, the sum of $5,000, no part of which was paid to or claimed by the Corporation (Pl. Ex. 10, R. 106).

With the knowledge which Mr. Schwartz had of the relationship between Donaldson and the Corporation, and, necessarily, of the fact that the Corporation was the owner of record of the copyrights of the music of the "Whoopee" stage production, Mr. Schwartz, as attorney for Samuel Goldwyn, obtained the synchronization rights from Donaldson only and obtained neither a grant nor a waiver of any rigths from the Corporation. This agreement, containing Donaldson's grant of renewal rights and his warranty of ownership of the synchronization rights, was signed in the first instance by Walter Douglas as Donaldson's attorney-in-fact (R.A. 21b, 22b).

Donaldson also wrote for Fox Film Corporation and Paramount Publix Corporation (R.A. 23b-25b, Deft. Ex. EE, R. 228, 294; Deft. Ex. GG, R. 119). The entire consideration under these contracts was paid to Donaldson and his co-author, and either Donaldson or the motion picture producer paid all his transportation and other expenses connected with the performance of those contracts (R. 190).

Mr. Douglas and Mr. Schwartz were unanimous in the understanding that Donaldson owned the dramatic and synchronization rights in the songs written by him (R.

157-158; R. 233-235). Douglas also conceded that the corporation had not the right to commit Donaldson to write anything without Donaldson's express permission (R. 259).

Donaldson's outside activities, in 1932, also included personal stage performances on the vaudeville circuit in Chicago (Deft. Ex. LL, R. 120).

The Agreement provided for the payment of royalties to Donaldson, at specified rates, only on income derived from the sale of printed copies and from the mechanical reproduction of the songs. These royalties were to be shared with his collaborators and producers and the amount to be paid out was subject to Donaldson's express approval. The Corporation was required "during the term of this contract" to deposit, in a special "Royalty Account", all royalties which became payable during each calendar month and Donaldson had "the right to withdraw such royalties deposited in such account as and when [he] may desire so to do" (R.A. 14b, Pl. Ex. 4, ¶3). The arrangement whereby Donaldson could draw on his earnings immediately and at will was, in itself, most unusual in that writers customarily received their accountings and were paid only at six month intervals (R. 271).

Paragraph "4" of the Agreement provided, separately, for a drawing account of $300 a week during the first six months and $500 a week during the balance of the five year term, such drawings to be deductible from any royalties theretofore or thereafter earned.

From the inception of the Agreement, May 15, 1928, to December 31, 1931, roughly three and one-half years, Donaldson actually earned royalties aggregating some $145,000. The payments made to him or for his account in that period amounted to approximately $168,000. Of the amount so paid, $78,000 was represented by weekly checks, the first of which was dated June 8, 1928 and

the last November 30, 1931, each in the sum of $300, specifically designated "weekly drawing account". Never at any time was he paid a "weekly drawing account" in the sum of $500. At no time after November 30, 1931, although the Agreement had still one and one-half years to run, was any further payment in any amount, made, charged or credited as "weekly drawing account" (Pl. Ex. 11, R. 110).

In response to Donaldson's request for the restoration of the weekly draw, in August, 1932 (R. 269), Douglas wrote on August 4, 1932 (Pl. Ex. 14, R. 269):

> "It would certainly be a pleasure to give it to you, Walter, it it were possible but you know how conditions are at the moment and that you might just as well ask for the Moon."

As of December 31, 1931, Donaldson had drawn some $23,000 more than his actual earned royalties. From January 1, 1932 to May 15, 1933, the end of the term, he earned royalties of $19,394.46. During that same period, he drew only $7,859.76 (no part of which was designated as weekly drawing account). The actual earned royalties were applied in reduction of the pre-existing debit balance. At the end of the term of the Agreement, there still remained a debit balance of $12,139.27 (Pl. Ex. 11-7, 8, 9, R. 110).

On May 15, 1933, Douglas wrote to Donaldson (Pl. Ex. 15, R. 278, 279-280):

> "I am sorry that you were unable to find your stock certificate. You see, Walter, I want to handle the proposition in such a way that in exchange for your turning in your stock certificate to the firm, the firm will give you a general release for the amount of your overdraft. There is no sense in your turning in your stock certificate for nothing and then, in case some stranger came in here, have him sue you for the overdraft and get a judgment against you and an attachment against your royalties from

> some other company for the amount of the judgment. In other words if you are going to turn in your certificate I want the consideration to be that you get a complete release in return. I guess we will have to let the matter rest until I get to California where we can have it done legally."

On June 8, 1933, at Douglas' request (R. 201-205), Donaldson surrendered his stock in the Corporation and received in return a general release of all liability for the amount of the overdraft (letter dated June 8, 1933 from Walter Donaldson to the Corporation, part of Deft. Ex. A, R. 110-111).

Summary of Argument

This Court has frequently held that the Rule is not applicable to, nor does it preclude on appeal, review of the correctness of a lower court's application of the facts to a required legal standard. Reversal is similarly permitted where there exists a firm conviction that a mistake was committed because the decision does not jibe with applicable law.

Here, the ultimate issue was the legal character of Donaldson's relationship to the Corporation. Was he an independent contractor or was he, as Petitioner contends, a "hired" employee within the meaning of the Copyright Act?

For the answer to that question, the Court of Appeals, as it had done many times before, properly invoked, and reaffirmed as controlling under the Copyright Act, the long, well-established legal standards traditionally determinative of the master-servant relationship. Applying those standards to the specific contractual relation evidenced by the Agreement and the fully documented acts of the parties in the performance thereof, the Court found that Donaldson's relationship was not one of service.

To the extent that uniformity of decision has been promoted by the restatement and definitive formulation of the requisite standard of conduct which shall constitute employment for hire within the meaning of the Copyright Act, the decision here is of compelling importance to the music industry. But since it is the particular contractual arrangement in each case which must be measured against the yardstick of those standards, the decision reached by the application of the facts here is narrowly limited, in its ramifications, to the parties immediately affected. Certain it is that no court will again see the like of the unique Agreement nor the singularly well-documented history of conduct reviewed here.

The correctness of the decision on the merits is manifest. The language and substance of the Agreement, standing alone and in the context of the other agreements simultaneously made, are consistent only with the independent contractor relationship. This construction is fully corroborated by the acts of the parties themselves. That the Agreement did not grant, and the Corporation never exercised, any control of Donaldson's performance of the contract is the keynote to his status.

In the copyright registrations of the Songs, Donaldson was always identified as the individual author. The Agreement controlled the rights of the parties. Under these circumstances the "corporate body," the impersonal work, provision of Section 24 clearly has no application and the Court of Appeals properly so held.

There is here neither conflict of decision nor broad, significant question of Federal law which requires decision by this Court.

POINT I

The Court of Appeals properly held the Rule inapplicable to its determination of Donaldson's status.

Petitioner's primary argument is that the Court of Appeals did not have the power, by reason of the Rule, to reverse the Trial Court's holding that Donaldson was an employee for hire.

The determination of the legal character of Donaldson's status involved "a two-step process". (*In re Hygrade Envelope Corp.*, 366 F. 2d 584, 587 (2d Cir. 1966)). The Trial Court was first required to determine factually what the parties agreed to and did in the creation and performance of the relationship. It had then to formulate that standard of conduct which, in law, constitutes employment "for hire" within the meaning of Section 24 of the Copyright Act, and to apply to that standard the basic evidentiary facts found.

The Trial Court made no findings of fact or conclusions of law other than those which appear in its opinion (P.A. 1a-8a). All of the evidentiary facts recited therein were either agreed upon or documentary. Without citing in support any of the basic facts found, the Trial Court made the bare conclusion that Donaldson "deliberately chose to be an employee for hire" (P.A. 6a-7a), a choice wholly at variance with business experience and human nature. (See *Brown* v. *McGraw-Hill Book*, 25 AD 2d 317, 320 (1st Dept. 1966)).

On the basis of that conclusion and on "the total picture" (P.A. 8a), the Trial Court made the ultimate determination of Donaldson's legal status. No standard of conduct for testing the existence of the status was set forth. No affirmative finding of fact was made as to any act upon which the Court relied as indicative of, or conforming to a legal standard of conduct requisite for, employment for hire. At best, negative findings were made to the effect

that certain undisputed acts did not compel a determination contrary to that status (P.A. 7a).

A comparison of the basic facts found by the Trial Court (P.A. 1a-5a, 6a-7a) and those relied upon by the Court of Appeals (P.A. 10a-13a, 14a-16a) will show them to be virtually identical, as they need must be, since the facts were, in the main, agreed or documentary. It is only in the ultimate conclusion from those facts, made by the Court of Appeals in applying them to the legal standard of employment for hire, that a divergence occurs.

For the purpose of insuring uniformity of decision in the district, the Court of Appeals, on review, restated the minimum legal standard of conduct which it deemed indispensable to the existence of employment for hire within the meaning of Section 24 of the Copyright Act (P.A. 16a). It held that an employee for hire in that context meant a technical and "substantial" employment, the essential element of which is "the right of the employer 'to direct and supervise the manner in which the writer performs his work' (see Nimmer, Copyright, § 62.31 (1964))" and common evidence of which is a fixed compensation not constituting a loan.

The Court did not purport to make new law. Some control of the means and manner of performance is the traditional and uniform hall-mark of service for hire. (*Cf. Tobani* v. *Carl Fischer, Inc.*, 98 F. 2d 57, 59 (2d Cir. 1938), cert. denied, 305 U.S. 650; See *Shapiro, Bernstein & Co.* v. *Bryan*, 123 F. 2d 697 (2d Cir. 1941); *Fred Fisher Music Co., Inc.* v. *Leo Feist, Inc.*, 55 F. Supp. 359, 360 (S.D.N.Y. 1944); 56 *Corpus Juris Secundum*, Section 2, p. 33; *Law of Copyright, Copinger and Skone-James*, 9th Ed., p. 17; *Matter of Miller*, 262 App. Div. 385, 387 (3d Dept. 1941)). Applying, without change, the basic, undisputed evidentiary facts found below, the Court of Appeals held that the formulated standard of employment had not been met.

This Court has many times approved, (and, thus, there remains no room for conflict among the Circuits) the exercise of appellate review in applying a correct legal standard or in correcting findings where made by the lower courts under a misapprehension of the applicable law. (*United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394-395; *Baumgartner* v. *United States*, 322 U.S. 665, 670-671, citing *Beyer* v. *Le Fevre*, 186 U.S. 114; *United States* v. *Parke Davis & Co.*, 362 U.S. 29, 44-45; *Skelly Oil* v. *Phillips Petroleum Co.*, 339 U.S. 667; *Mamiye Bros.* v. *Barber SS. Lines, Inc.*, 360 F. 2d 774, 776-78 (2d Cir. 1966), cert. denied, 385 U.S. 835).

Whether the holding that the facts as found did not constitute employment for hire is one strictly of law (*Matter of Rheinwald* v. *Builders' Brick and Supply Co.*, 168 App. Div. 425, 431 (3d Dept. 1915)) or one of mixed law and fact (*Mitchell* v. *Strickland Transportation Company*, 228 F. 2d 124, 126 (5th Cir. 1955)) need not be decided.

As the Court of Appeals below recently said, on the question of notice of insolvency, in *In re Hygrade Envelope Corp.*, 366 F. 2d 584, 588:

> ". . . The scope of review might be better understood by recognizing that the imperatives of F. R. Civ. P. 52(a) and its analogues are avoided whenever the issue is not one of 'fact'; there is no necessity for going further and endeavoring to establish that it is one of 'law' . . . as we have recently noted, there are substantial reasons, particularly relating to consistency of decision, that dictate rather full review. *Maymiye Bros.* v. *Barber S.S. Lines, Inc.*, 360 F. 2d 774, 778 (2 Cir. 1966). To be sure an appellate court must respect findings of the trial judge as to what in fact happened and in addition should give due weight to his superior opportunity to acquire the true feel of the case. . . . But when the issue is his application of a legal standard to facts undisputed or reasonably found, reversal is not limited to results that are 'clearly erroneous'; it is

> enough that the appellate court should be convinced, as we are here, that the result does not jibe with the applicable rule of law.[4] ''

The footnote indicated in the quotation above is equally apt:

> ''Although reversal in such a case could often be deemed justified under the principle that the 'unless clearly erroneous' rule does not protect when the reviewing court has 'the definite and firm conviction that a mistake has been committed,' *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394-395, 68 S.Ct. 525, 542, 92 L. Ed. 746 (1948), clarity is promoted by recognizing that the application of a legal standard to the facts is not a 'finding of fact' within the rule.''

Since the contracting parties created and memorialized their relationships in the form of written agreements, surely those documents were of first importance in determining the legal character of those relationships. The execution and contents of the documents was undisputed. The Court of Appeals had an opportunity equal to that of the Trial Court to construe the Agreement, both standing alone and in the context of the other instruments contemporaneously made. (*Irvani* v. *Mottaghi*, 244 F. 2d 238, 248 (2d Cir. 1957), cert. denied, 354 U.S. 939; *Fahs* v. *Taylor*, 239 F. 2d 224, 226 (5th Cir. 1956), cert. denied, 353 U.S. 936).

The Trial Court did not purport to apply rules of construction to those documents, finding only that they presented a ''clouded picture'' (P.A. 6a) of Donaldson's status. The Court of Appeals was not foreclosed from looking behind the cloud to discern meaning and effect from the agreements actually made by the parties and their acts, equally well-documented, in the performance thereof.

Even the Ninth Circuit, in its exercise of the utmost limits of self-restraint, concedes the freedom of the appellate court to construe a contract, without ''indulging pre-

sumptions as to the interpretation below'' (*United Artists Corp.* v. *Strand Productions,* 216 F. 2d 305, 310 (9th Cir. 1954)).

Tyler v. *Lowe,* 138 F. 2d 867 (2d Cir. 1943), cited as authority contrary to the scope of the review exercised here, is readily distinguishable. In *Tyler,* the existence of the master-servant relationship was not at issue. The question there was only as to which of two persons was the employer. That determination was a pure question of the fact of identity, which did not require construction or the application of any legal standard. The Court held that on the basis of the record in that case, the finding of the Trial Court that the named defendant was not, as a matter of fact, the person who employed the plaintiff, could not be found to be clearly erroneous.

POINT II

The conclusions drawn by the Court of Appeals from the basic evidence below were correct.

Although the Court of Appeals held the Rule inapplicable to its determination, it is submitted that reversal of the Trial Court's ultimate conclusions would have been justified as being clearly erroneous.

1. The Language of the Agreement

From the outset of this action, counsel for the Corporation have assiduously avoided reference (with the exception of the one word ''employment'') to the language of the Agreement, standing alone or in the context of the contemporaneous agreements. There has never been even an attempt to explain the difference between the commital language of the Donaldson Agreement as against the other two, all of which stem originally from the single document, the first draft.

If all three parties were intended to have the same legal relationship to the Corporation, why, under the aegis of a skilled draftsman, were two clearly and unequivocally committed to enter into the employ and to render services, while the third, Donaldson, committed himself only "to enter into a contract" to write and compose exclusively for the Corporation? When the word "employment" was inserted in the pre-incorporation agreement, not one word was changed in the paragraph of the first draft which expressed Donaldson's undertaking. His obligation remained "to enter into a contract," the making of which was the stated consideration given by Donaldson for the assumption of the Corporation's obligations "during the term of your contract" (R.A. 8b, 9b, 10b).

It must also be asked why, if the Corporation, as an employer, would own all rights in all of the works to be composed, were only publication and mechanical rights granted—and those conditioned upon the payment of the royalties provided? As "author," under the Copyright Act, the copyright would automatically belong to an employer (17 U.S.C. § 26); yet the draftsman seemingly saw the necessity here expressly to confer upon the Corporation the right to obtain copyright.

The answers come readily with recognition that the Agreement was drawn as an exclusive publishing contract with an independent writer, in conformity with a well-established, judicially-recognized custom in the music industry.

> "In the music industry, the prevailing custom is that statutory copyright in sheet music is secured in the name of the publisher. The publisher then holds the copyright in trust for the composer with respect to all rights or portions of rights not transferred to the publisher." (Copyright Office Law Revision Study No. 11, p. 23.)

See also *April Productions* v. *G. Schirmer, Inc.*, 308 N.Y. 366, 369-370, 374-375 (1955); *Musical Copyright*, Alfred M.

Shafter (2d Ed., 1939), pp. 143-144; *Adolph Phillip* v. *Remick Music Co.*, (S.D.N.Y. 1936); E. 79-236. Opinion No. 9,999, Judge Bondy [not officially reported].

That this is so, is manifest from Mr. Schwartz' expression of opinion (he remembered nothing of the actual events), on reading the Agreement at the trial, as to its meaning and effect. He said (R. 157-158):

> "Your Honor, in this field, there are varying rights. There is [sic] dramatic rights, stage performing rights, motion picture rights, television rights, radio rights, recording rights, publication and mechanical rights.
>
> As I read this agreement, it was never intended that anything be conveyed except the mechanical and the publication rights. All the other rights were reserved and retained by the writer, that was the usual and customary procedure in the business.
>
> So that when he made a contract with Ziegfeld for the production of a show, the music, the mechanical and publication rights belonged ipso facto, according to this contract, forever to the corporation. But so far as the dramatic rights are concerned, the performing rights, the motion picture rights and all these other allied rights, they were retained by the writer. That was the usual and customary arrangement in the business, invariably so."

Contemporaneous corroboration that his understanding was the same at the relevant time is found in the Goldwyn agreement (R.A. 19b-22b, Pl. Ex. 9, R. 106), which Mr. Schwartz drew (and, at the trial, did not remember so doing (R. 135)).

In construing the Agreement and the legal relationship which it established, the Court of Appeals properly relied upon the entire agreement, and what the parties did in pursuance thereof (*Mitchell* v. *Strickland Transportation Company, supra*), rather than the label which the Corporation has consistently sought to stamp upon it by the single use of a single word.

2. The Absence of Control

From an examination of the Agreement itself, the Court of Appeals elicited the single most significant criterion in measuring Donaldson's status against the formulated standard of employment for hire. Neither expressly nor impliedly does the Agreement grant or reserve to the Corporation that *sine qua non* of "substantial" employment, the right to supervise or control Donaldson's creative work. The Corporation had not the right to direct when, where, what, if anything, or with whom he should write. Much less was there granted the right to assign control to others.

The reviewing Court, from the Agreement itself and perhaps the only certain testimony of both Douglas and Mr. Schwartz, could and did determine that Donaldson himself owned dramatic and synchronization rights. The Corporation had no obligation to pay for those rights, Donaldson received all of the compensation paid for those rights, and Donaldson himself paid out of his own royalties, on terms required to be approved by him, the royalties to which producers would become entitled for the publication and mechanical reproduction rights as to which, concededly, by specific grant, the Corporation had the exclusive rights.

Douglas testified unequivocally that the Corporation never claimed the power to commit Donaldson to write for the stage or screen and never did in fact make such a commitment except with Donaldson's consent (R. 259). Coupled with the absence of contractual right, this admission, it is submitted, is dispositive of the so-called "farm-out" of Donaldson's services as evidence of control.

That the Corporation would benefit indirectly from increased exploitation of its exclusive rights of publication and mechanical reproduction is obvious. It was, however, Donaldson's exclusive province to determine whether or not he would engage himself in writing for stage or screen.

In signing contracts with third parties, in Donaldson's name, Douglas clearly acted for Donaldson.

Mr. Schwartz (who, better than any other person, knew the legal relationship of the parties), just 18 months after making the Agreement, as attorney for Samuel Goldwyn, obtained the motion picture rights to the "Whoopee" songs only from Donaldson, for both the original and renewal terms of copyright. It is beyond belief that if Mr. Schwartz understood that the Corporation, the registered copyright owner, was the owner of a work made for hire, that he would not have required the Corporation's assignment to Goldwyn. He did not do so.

The statement in the Fox contract (Deft.'s Ex. EE, R. 228) that Donaldson and his co-author Leslie were the "employees" of the Corporation is a self-serving declaration which was not seen by Donaldson (R. 265). In none of the agreements which Donaldson himself signed did any such statement ever appear. Douglas testified that the power of attorney pursuant to which he acted for Donaldson was either a letter or a telegram (R. 224). Leslie, the other so-called "employee", testified that he had never seen the Agreement, that he was not an employee, nor had he ever been (R. 174). Douglas conceded that Leslie had not been an employee except for the twelve weeks covered by the Fox contract, that, in fact, the sole compensation paid to Leslie under that contract came from Fox, and that all expenses under that contract were paid either by Fox or by the composers themselves (R. 264).

With the collapse of the "farm-out" theory, Petitioner now urges that because of the creative character of Donaldson's work and his position in the Corporation, the failure of the Agreement to reserve even a semblance of supervisory direction and control is without significance. One need only look to the *Fox* agreement for an illustration of the degree to which creative talent is customarily supervised in true employment (R.A. 23b-24b, Dept. Ex. EE). (See also

Tobani v. *Carl Fischer, Inc., supra; Shapiro, Bernstein & Co.* v. *Bryan, supra*).

Donaldson alone had the right to decide if he would write for the stage or screen, (or, for that matter, what and how much, if anything, for the Corporation) and he alone had the right to determine whether or not he would have collaborators and who they should be. Payments to collaborators and producers were made from Donaldson's royalties, on terms expressly subject to his approval. He had the right to withdraw his royalties as and when he desired (R.A. 14b). It is difficult to conceive of a greater degree of freedom and independence.

3. The Oral Testimony

Petitioner seeks to overcome the effect of the documentary evidence by reliance upon the testimony of Mr. Douglas and Mr. Schwartz.

At the time of trial, Douglas, then 75 years old, was, and for 27 years past had been, employed by Music Publishers Protective Association, of which Jack Bregman, President of the Corporation, was one of the nine directors who voted on his salary (R. 281-282).

The totality of Douglas' testimony as to the intended meaning of the Agreement was a single statement (R. 370) to the effect that the parties told Mr. Schwartz, at their first meeting, to make employment agreements for all. The first draft, which was the result of that first meeting, has remained unaffected by the passage of time. The document so directly contradicts Douglas' testimony of the alleged instructions as to make his version of the events implausible.

That not one word of Donaldson's supposed "employment" appears in the first draft, nor even in the marginal corrective notes, is a permanent record that employment was not discussed, not intended and not so agreed.

The probative value of Mr. Schwartz' testimony may be judged from the fact that on seven different occasions (R.A. 26b-28b, R. 135, 136, 141, 142, 147, 155, 162) he stated that he had no independent recollection of any of the relevant events, the meetings, the intention of the parties or what was in his own mind. His "testimony" (misleadingly quoted, in the Petition, entirely out of context) consisted of opinions reluctantly given at the prodding of the Court. More convincing and reliable than Mr. Schwartz' recent hypotheses is what he did in relation to the Goldwyn contract at the time, with the certain knowledge he then had.

Powers' testimony, by deposition, related alleged conversations of more than 30 years before. Aside from the inherent unlikelihood that the incidents occurred in the precise manner reported, Mr. Powers' purported verbatim recall after so many years is suspect on that ground alone.

In evaluating the weight to which the oral testimony was entitled, it is submitted that the Court of Appeals was, as in *United States* v. *Fay*, 353 F. 2d 56, 59 (2d Cir. 1965), guided by the caveat of this Court.

> "Common sense tells us that when the . . . pan is filled with probative documentary evidence, only the strongest contrary oral testimony could prevail, especially when proferred by an interested party as to occurrences of long ago. As the Supreme Court itself has said, in a civil case governed by the preponderance standard 'Where . . . testimony is in conflict with contemporaneous documents we can give it little weight.' *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 396, 68 S. Ct. 525, 542, 92 L. Ed. 746 (1948)."

4. Compensation

During the course of this litigation the Corporation's theories as to the "weekly drawing account" have run the gamut from salary, to guaranteed weekly non-returnable advances, and now finally to that of a guaranteed minimum of income over the term of the contract.

Since the payments stopped a year and half before the end of the term, they certainly were not salary in the traditional sense. They were not guaranteed weekly advances, because even if Donaldson were overdrawn, future advances would at least have been required to have been credited against the overdraw. This, of course, was not done. Only actual earned royalties were credited. That the drawing account was not intended to be a guaranteed minimum is evidenced by the fact that although by February, 1931, Pl. Ex. 11, pp. 93-94) Donaldson had drawn some $7,000 more than the so-called guaranteed minimum of $124,800, the Corporation continued to pay the weekly draw until November, 1931. Douglas conceded that Donaldson would have continued to get the payments if the Corporation had the money (R. 271).

The fact is that Donaldson was entitled only to his earned royalties. Everything over that amount was a loan which had to be repaid, and at the end of the term, the outstanding $12,000 overdraw, on threat of possible suit (Pl. Ex. 15, R. 278), was repaid by the surrender of Donaldson's stock.

POINT III

The Corporation was the exclusive licensee of publication and mechanical rights and held the copyright in trust for Donaldson for the purposes of the Agreement.

Petitioner questions the character of its rights under the determination that Donaldson was an independent contractor and claims that, even if it is deemed an assignee, it would have all rights (albeit not renewal rights), in the Songs because of the absence of any reservation of rights by Donaldson.

Under the Agreement, the Corporation was the exclusive licensee of the publication and mechanical rights and

under the prevailing custom in the industry (pages 17-18, *supra*), held the copyright as trustee for Donaldson as to all other rights.

It is conceded that whatever foreign rights Donaldson may have had under the Agreement, he consented to the grants made to foreign publishers by the Corporation, since that obviously was the plan by which the Corporation was to be financed. No claim has been made here to disturb the foreign grants or the rights of the Corporation thereunder. The claim is confined solely to the United States renewal copyrights.

Whatever was the Corporation's participation in performance fees from ASCAP derived from its membership in that society, as a publisher member. No writer can control the payments of the publisher's share of performance fees under the rules of that organization, to which both parties, as members, were subject.

POINT IV

The corporate body provisions of the Copyright Act are inapplicable.

The authorities are unanimous in the view that the statutory provision with respect to the right of a corporate body to renew as proprietor (17 U.S.C. § 24) is, for all practical purposes, meaningless; that if it has any possible application, it is intended for that class of blended works, the individual contributions to which are impossible of identification. (Hon. Learned Hand, in *Shapiro, Bernstein & Co., Inc.* v. *Bryan,* 123 F. 2d 697 (2d Cir. 1941); *Copyright Office Law Revision Study No. 31,* pp. 134-137; *Nimmer On Copyright,* 1967, § 114.3, p. 468). Donaldson was, in every instance, specifically identified by the Corporation in its own copyright registration as the author of the works composed by him.

Petitioner contends that because Donaldson played some of the Songs on a piano owned by the Corporation and some of the Songs were physically notated by arrangers paid by the Corporation, the Songs became corporate works. Never were the arrangers, these ministerial, musical secretaries, named in a claim to copyright as a co-author, nor did the Corporation claim copyright as the proprietor of a corporate-body work.

The parties did not rely, for the determination of their rights, upon this amorphous statutory provision (which, as to new works, has been eliminated entirely in the proposed new Copyright Act. See H.R. 4347 § 302). They sought to fix their rights by express contract, the Agreement, which would be rendered academic by implication of the statute. As it is said, *expressum facit cessare tacitum*—"that which is expressed make that which is implied to cease [that is, supersedes it, or controls its effect]." (Black's Law Dictionary, 3d Ed., p. 727.)

It may be noted that in commending to the Court's consideration the importance of the issue here to the industry, Petitioner has referred to the broad scope of corporate ownership of copyrights, citing *Howell's Copyright Law* (p. 53, Rev. Ed., 1962), [Petitioner's Brief, p. 15]. The reference omits a significant part of *Howell's* statement.

> "A survey of the practices in the first half of 1955 indicated that claims to copyright in about 92% of motion pictures, 93.7% of periodicals and 38.8% of all works, *were registered by corporate or other legal entities as 'authors'*." (Emphasis ours.)

There is no question of the rights of employers of works truly made for hire, and it would appear that, when there is substantial employment, the large number of employers leave no doubt as to their rights and, as provided by the statute, claim to copyright is made by them "as authors". Unlike those employers cited in the

survey, never once during the entire five year term of the Agreement did the Corporation claim a copyright as author. Presumably it did not at the time deem itself entitled so to do.

It is submitted that Donaldson was an independent contractor, for which reason the claims to copyright affirmed his status as author and preserved for his children the birthright which Congress saw fit to grant them.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition herein for a writ of certiorari should be denied.

Respectfully submitted,

LEWIS A. DREYER,
1619 Broadway,
New York, New York 10019.

NORMA HACK,
ROSEN, SETON & SARBIN,
Of Counsel.

APPENDIX

Excerpts from Pre-Trial Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

(R. pp. 50-54)

DONALDSON PUBLISHING CO.,

Plaintiff,

against

BREGMAN, VOCCO AND CONN, INC.,

Defendant.

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* * *

2. The parties agreed that the trial of this action shall be based upon this order and upon the pleadings as amended, except that the following issues raised by the pleadings are expressly abandoned: None.

3. (a) The parties stipulated that the following facts are not in dispute in this action (each party reserving the right to object to the materiality of any such stipulated fact and its relevance to the issues):

(i) Walter Donaldson and defendant (under its then corporate title, Donaldson, Douglas & Gumble, Inc.) entered into an agreement dated May 15, 1928. All of the musical compositions written in whole or in part by Walter Donaldson during the term of the said agreement were delivered to Donaldson, Douglas & Gumble, Inc.

(ii) Defendant caused said Agreement of May 15, 1928 to be recorded in the Copyright Office Records of Assignments and Related Documents (Volume 910, Pages 119-124) on June 4, 1954, and there was annexed to said Agreement, when recorded, a Schedule of Compositions which had been prepared by defendant.

Excerpts from Pre-Trial Order

(iii) In said Schedule of Compositions are set forth the names of the eighty-seven compositions which were written by Walter Donaldson, either alone or with Edgar Leslie, Gus Kahn or Joe Young, and which were copyrighted by defendant in its own name between May 28, 1928 and April 12, 1933, both dates inclusive, and the said eighty-seven compositions are the same as the eighty-seven compositions which are set forth in the pleadings herein.

(iv) The publication rights and mechanical reproduction rights of defendant in said musical compositions (which said rights are mentioned in paragraph numbered 5 of said Agreement), were subject to the payment by defendant of the royalties specified in said Agreement. During the five-year period of the Agreement, defendant rendered statements to Walter Donaldson, which statements were identified on pre-trial examination of Walter Douglas as Exhibits "P-1" through "P-9". It is conceded that said statements were delivered to Walter Donaldson and that the royalty payments indicated as due thereon to Walter Donaldson were paid.

(v) All of the eighty-seven compositions mentioned in said Schedule of Compositions were duly copyrighted by defendant in its own name (under its former corporate title, Donaldson, Douglas & Gumble, Inc.) and such copyrights were duly registered in the U. S. Copyright Office by defendant under its said former corporate title under the respective dates of publication or dates of registration set forth in said Schedule of Compositions.

(vi) Walter Donaldson died prior to the expiration of 27 years after the commencement of the first term of copyright of said compositions or any of them.

(vii) Walter Donaldson was not survived by a widow in the ordinary sense but was survived by a divorced wife, namely, Dorothy Donaldson.

(viii) Walter Donaldson was survived by only two (2) children, who are Ellen Bernice Donaldson (married name, Kerslake), and Sheila Lynn Donaldson (married name, Shea).

(ix) Within one (1) year prior to the expiration of the original term of each of the 95 copyrights in said eighty-seven compositions (the details concerning said copyrights being set forth in said Schedule of Compositions), the said children of Walter Donaldson, made application to the U. S. Copyright Office for the renewal and extension of each of said copyrights for the further term of 28 years, and each such application was duly registered in the U. S. Copyright Office within said year prior to the expiration of the original term of copyright. Similarly, defendant made application to the United States Copyright Office for the renewal and extension of said copyrights, which applications were duly registered in the United States Copyright Office.

(x) The photocopies annexed as Exhibit "5" of the affidavit Charles B. Seton submitted and filed in support of plaintiff's motion for summary judgment herein, are photocopies of each of the 95 Certificates of Registration of A Claim To The Renewal Of A Copyright with respect to the eighty-seven compositions set forth in said Schedule of Compositions, signed, sealed and issued by the Register of Copyrights, evidencing that said two children of Walter Donaldson had made applications to the U. S. Copyright Office for the renewal and extension of the copyrights in said eighty-seven compositions and had made the claims and statements in said applications which are set forth in said 95 Certificates of Registration.

(xi) Said Ellen Bernice Donaldson (married name, Ellen Bernice Kerslake) entered into the agreements with plaintiff and executed the assignments to plaintiff, copies of which are annexed as Exhibits "A", "B" and "C" respectively, to the affidavit of Ellen Bernice Kerslake, submitted and filed in support of plaintiff's motion for summary judgment herein.

(xii) Said Sheila Lynn Donaldson (married name, Sheila Lynn Shea) entered into the agreement with plaintiff and executed the assignment to plaintiff, copies of which are annexed as Exhibit "A", and as Exhibit 1 of Exhibit

"B" (pages 4-7 of Exhibit "B"), to the affidavit of said Ellen Bernice Kerslake, submitted and filed in support of plaintiff's motion for summary judgment herein.

(xiii) Walter Donaldson and Gus Kahn wrote the nine compositions, whose titles are set forth in Schedule "B" annexed to the Second Amended Complaint (and are also contained in said Schedule of Compositions).

(xiv) Defendant entered into an agreement with Florenz Ziegfeld, dated November 21, 1928, a copy of which, marked Exhibit "Y", was identified by Walter G. Douglas in his deposition taken herein by defendant on December 2, 1959. (Said agreement is hereinafter referred to as "Ziegfeld Agreement".

(xv) The dramatico-musical composition entitled "Whoopee", is the dramatico-musical composition which is referred to in said Ziegfeld Agreement.

(xvi) That Nathan Burkan, Esq. was the attorney for Donaldson, Douglas & Gumble, Inc., and that Charles Schwartz, Esq. of that firm was the actual draftsman of:

(aa) The Agreement of May 15, 1928.

(bb) A paper labeled "The First Draft" in the handwriting of Charles Schwartz, Esq., of the pre-incorporation agreement between Walter Donaldson and the Messrs. Douglas and Gumble, dated April 23, 1928, a copy of which was marked as plaintiff's Exhibit "SA" for identification on the deposition of Charles Schwartz herein.

(cc) The Agreement of May 4, 1928, between Walter Donaldson and the Messrs. Douglas and Gumble (defendant's Exhibit "S2" for identification on the deposition of Charles Schwartz).

(xvii) That by instrument dated June 8, 1933, Walter Donaldson sold and transferred to Donaldson, Douglas & Gumble, Inc. his total stock interest in that corporation amounting to thirty-three and one-third (33⅓) shares of common stock.

• • •

Court Exhibit 1

(ADMITTED AT PAGE 99 OF RECORD)

PROPOSED STIPULATIONS FOR TRIAL

1. Walter Donaldson, either alone or with Gus Kahn, Edgar Leslie or Joe Young, during the period between May 28, 1928 and April 12, 1933, wrote 87 musical compositions which are set forth in the schedule annexed to the complaint. The said 87 compositions are the subject of 95 copyright registrations, all of which were duly filed in the Office of the Register of Copyrights in the name of Donaldson, Douglas & Gumble, Inc. as copyright owner, and in which Walter Donaldson is named as a sole or as a co-author.

2. Walter Donaldson died July 15, 1948, prior to the expiration of the 27th year of the respective original terms of copyright, survived by two daughters, namely Ellen Bernice Donaldson (now Kerslake) and Sheila Lynn Donaldson (now Shea).

3. As to all of said 95 copyrights in the 87 compositions, in the last year of the respective original terms of copyright, applications for renewal of copyright were filed both by defendant, claiming as employer for hire of Walter Donaldson, and by the two daughters of Walter Donaldson, claiming as the children of the author.

4. Plaintiff is at this date the assignee of all right, title and interest, if any, of the children of Walter Donaldson in and to the renewal copyrights at issue, and all claims and demands with respect thereto. There is expressly reserved for any accounting or other proceeding herein the issues raised by defendant as to the dates on which the assignments to plaintiff became effective, and the applicability thereto of the defenses of the statute of limitations, laches and real party in interest.

Plaintiff's Exhibit 2

(Admitted at Page 100 of Record)

(Photostats)

(See opposite ☛)

(Hand-Written Marginal Notes Appearing Illegible on Reproductions, Appear as Follows on Original)

"production 8¢ producer"

"the corporation shall arrange to pay to other collaborators their compensation or royalty, such compensation or royalty to be paid out of the sums payable to you hereunder but all such compensation or royalty payable to such collaborators shall be subject to your approval."

"Drawing a/c 300. a week for 1st six months. 500 a week for balance of term."

"5 y for each of you. If any get out $5,000."

"Death—fair appraisal value 50%."

PLAINTIFF'S EXHIBIT 2

April 22nd, 1926.

Mr. Walter Donaldson.

Dear Mr. Donaldson,

The following is our agreement:

1. You and we agree to promptly cause to be organized under the laws of New York a corporation under the name of Walter Donaldson, Inc. Music Publishers, or if that name is not available, such other name as we mutually agree upon, such corporation to have a capitalization of 100 shares of no par value, to conduct the business of music publishers, the provisions of the Certificate of Incorporation to give such corporation the broadest powers incidental to the conduct and operation of a music publishing business.

2. The corporation is to have three directors consisting of you and ourselves.

As soon as the Board of Directors is elected, we agree to appoint as officers the following:

You to be the President,
Douglas to be the Vice-President and Treasurer,
Gumbel to be the Secretary.

3. You agree, promptly upon the formation of the corporation, to enter into a contract with the corporation upon the following terms:

You agree to write and compose musical works for the corporation exclusively, for a period of ten years from the date of the incorporation of the company.

In consideration of your making such contract, the corporation will agree to deliver to you one-third of its entire capital stock, and to pay you the following royalties:

A sum equal to 10% of the retail market price of all music written or composed by you which is sold by the company, your royalty, however, to be in no event less than 2¢ for and upon each and every copy of sheet music of such musical works sold in the United States and Canada. You are also to receive 50% of all moneys collected by us from the mechanical reproduction of any such works.

You are also to receive one-half of all moneys collected by us as foreign royalties whether because of the publication of such works in foreign countries or because of their mechanical reproduction.

If you have any collaborators in any such works, the collaborators will be compensated by you out of your royalties aforesaid.

The corporation shall monthly during the term of your contract deposit in a special account to be known as the "Royalty

Account" all royalties which have become payable to you during each such current month, and you shall have the right to withdraw such royalties deposited in such account as and when you may desire so to do.

All publication and mechanical reproduction rights in your musical works written and composed during the term of your contract with the corporation, shall be and vest in the corporation immediately upon the creation of such musical works by you, subject, of course, to the payment to you of the royalties above specified, and the corporation shall have the right to secure copyright in its name in all such works.

The corporation will obligate itself to print and publish in first class style such of your musical works as they may deem suitable for publication and for which they believe there will be a public demand, and the corporation will agree to use its best efforts to introduce such musical works into the general market and to popularize and create a demand for the same.

4. Douglas agrees to enter into the employ of the corporation promptly after its incorporation, as Business Manager, and he is to agree to devote himself exclusively to the rendition of his services to the corporation. He is to receive for his services $200. per week. He is also to subscribe and pay for one-third of the capital stock of the corporation, the price to be fixed by the Board of Directors at a nominal amount.

5. Gumble agrees to enter into the employ of the corporation promptly after its incorporation, as Professional Manager, and he is to agree to devote himself exclusively to the rendition of his services to the corporation. He is to receive for his services $250. per week. He is also to subscribe and pay for one-third of the capital stock of the corporation, the price to be fixed by the Board of Directors at a nominal amount.

6. The term of employment of Douglas and Gumble shall continue only so long as each such respective party shall be a stockholder of the corporation. If at any time either such party shall cease to be such stockholder, then from and after such date the employment of such party by the corporation shall cease and come to an end.

7. In the event either Douglas or Gumble shall cease to be a stockholder of the corporation at any time prior to the expiration of the ten year term of contract between the corporation and Donaldson, then upon such person ceasing to be a stockholder of the corporation, Donaldson shall have the right to terminate his contract with the corporation, and the ten year period of his contract shall be shortened to the foregoing extent.

8. The By-laws of the corporation are to contain a provision that stock of the company shall not be assignable or transferable or otherwise disposed of unless and until the

stockholder desiring to transfer or dispose of the same shall first offer the same to the remaining stockholders at the book value of such stock at the time such selling stockholder shall offer to sell the same, and the remaining stockholders shall have sixty days from and after the date such selling stockholder shall offer to sell such stock within which to purchase the same. If both remaining stockholders shall desire to purchase such stock, they shall be entitled to acquire such stock so offered for sale pro rata. If neither of the remaining stockholders shall desire to purchase such stock offered for sale within the above mentioned sixty day period, then the stock offered for sale shall be freed and released from the restriction hereinabove contained.

9. The depositary of the company shall be the Bowery & East River National Bank. Checks are to be signed by the Treasurer and countersigned by the Secretary.

Your signature at the foot hereof underneath the word "Accepted" will make this a binding agreement between us.

Very truly yours,

. . . . . .
Walter Douglas

. . . . . .
Rose Gumble

ACCEPTED:

. . . . . .
Walter Donaldson

Plaintiff's Exhibit 3

(Admitted at Page 101 of Record)

May 4th, 1928.

Mr. Walter Donaldson.

Dear Mr. Donaldson,

The following is our agreement:

1. You and we agree to promptly cause to be organized under the laws of New York a corporation under the name of Walter Donaldson, Inc. Music Publishers, or if that name is not available, such other name as we mutually agree upon, such corporation to have a capitalization of 100 shares of no par value, to conduct the business of music publishers, the provisions of the Certificate of Incorporation to give such corporation the broadest powers incidental to the conduct and operation of a music publishing business.

2. The corporation is to have three directors consisting of you and ourselves.

As soon as the Board of Directors is elected, we agree to appoint as officers the following:

You to be the President,
Douglas to be the Vice-President and Treasurer,
Gumble to be the Secretary.

3. You agree, promptly upon the formation of the corporation, to enter into a contract with the corporation upon the following terms:

You agree to write and compose musical works for the corporation exclusively, for a period of five years from the date of the incorporation of the company.

In consideration of your making such contract, the corporation will agree to deliver to you one-third of its entire capital stock, and to pay you the following royalties:

Plaintiff's Exhibit 3

A sum equal to 10% of the retail price of all music written or composed by you which is sold by the company, subject to the proviso that your royalty shall in no event be less than 3¢ for and upon each and every copy of sheet music of such musical works sold in the United States and Canada, subject to the further proviso that with respect to production numbers your royalties shall in no event be less than 8¢ for and upon each and every copy of sheet music thereof sold in the United States and Canada. You are also to receive 50% of all moneys collected by us from the mechanical reproduction of any such works in the United States and Canada.

You are also to receive one-half of all moneys collected by us as foreign royalties whether because of the publication of such works in foreign countries or because of their mechanical reproduction.

If you have any collaborators in any such works, the corporation shall arrange for and pay to such collaborators their compensation or royalty, such compensation or royalty to be paid out of the sums payable to you hereunder, but the amount of such compensation or royalties payable to such collaborators shall be subject to your approval. Furthermore, in the case of production numbers, the corporation shall arrange for and pay to the producer of the musical plays containing such production numbers the compensation or royalty, if any, which may be payable to him on account of the publication or mechanical reproduction of any such production numbers, such compensation or royalty to be paid out of the sums payable to you hereunder, but the amount of such compensation or royalty shall be subject to your approval.

The corporation shall monthly during the term of your contract deposit in a special account to be known as the "Royalty Account" all royalties which have become pay-

able to you during each such current month, and you shall have the right to withdraw such royalties deposited in such account as and when you may desire so to do.

You shall have a drawing account against your royalties of $300. per week during the first six months of your employment, and of $500. per week during the balance of the term. The corporation shall have the right to deduct such drawings from any royalties that may have theretofore or that may thereafter accrue to you.

All publication and mechanical reproduction rights in your musical works written and composed during the term of your contract with the corporation, shall be and vest in the corporation immediately upon the creation of such musical works by you, subject, of course, to the payment to you of the royalties above specified, and the corporation shall have the right to secure copyright in its name in all such works.

The corporation will obligate itself to print and publish in first class style such of your musical works as they may deem suitable for publication and for which they believe there will be a public demand, and the corporation will agree to use its best efforts to introduce such musical works into the general market and to popularize and create a demand for the same.

4. Douglas agrees to enter into the employ of the corporation for a period of five years from the date of its incorporation, as Business Manager, and he is to agree to devote himself exclusively to the rendition of his services to the corporation. He is to receive for his services $300. per week. He is also to subscribe and pay for one-third of the capital stock of the corporation, the price to be fixed by the Board of Directors at a nominal amount.

5. Gumble agrees to enter into the employ of the corporation for a period of five years from the date of its incor-

poration, as Professional Manager, and he is to agree to devote himself exculsively to the rendition of his services to the corporation. He is to receive for his services $300. per week. He is also to subscribe and pay for one-third of the capital stock of the corporation, the price to be fixed by the Board of Directors at a nominal amount.

6. The By-Laws of the corporation are to contain a provision that stock of the company shall not be assignable or transferable or otherwise disposed of unless and until the stockholder desiring to transfer or dispose of the same shall first offer the same to the remaining stockholders for the sum of $5,000. for his one-third of the capital stock, and the remaining stockholders shall have sixty days from and after the date such selling stockholder shall offer to sell such stock within which to purchase the same. If both remaining stockholders shall desire to purchase such stock, they shall be entitled to acquire such stock so offered for sale pro rata. If neither of the remaining stockholders shall desire to purchase such stock offered for sale within the above mentioned sixty day period, then the stock offered for sale shall be freed and released from the restriction hereinabove contained.

In the event of the death of any stockholder, then the executor, administrator, legatee or other party succeeding in law to title in such stock by reason of such death shall not have the right to assign, transfer or otherwise dispose of such stock excepting only as follows: The corporation on behalf of the remaining stockholder or stockholders shall have the right to purchase such stock at 50% of its fair appraised value as of the date of death, such option to be exercised by written notice given to the executor or administrator of the estate within 120 days from and after their respective appointment. In case such option shall not be exercised within such period, then upon the expiration of such 120 day period, such stock shall be freed and released

from any restrictions, and shall be transferable, assignable or otherwise disposed of, free from any further restriction.

In case, however, the corporation shall exercise such option, then within ten days after the exercise of such option the corporation shall appoint one appraiser, and the executor and administrator shall appoint another appraiser, and the two appraisers shall within ten days thereafter agree upon a third appraiser. The three appraisers shall proceed with all diligence to appraise the fair value of the stock, and the affirmative decision of at least two out of the three appraisers as to such fair value shall be deemed to be the appraised value of such stock, upon which the 50% to be paid for such stock shall be computed. Such stock shall be paid for by the corporation on behalf of the remaining stockholder or stockholders within ten days after receipt by the corporation of the written decision of a majority of the appraisers fixing such appraised value. In case of the failure of either party to appoint its respective appraiser, or in case of the failure of the two to agree upon the third appraiser, then such appraiser shall be appointed in the manner to be fixed by the By-Laws of the corporation as prepared by counsel for the corporation.

9. The depositary of the company shall be the Bowery & East River National Bank. Checks are to be signed by the Treasurer and countersigned by the Secretary.

Your signature at the foot hereof underneath the word "Accepted" will make this a binding agreement between us.

Very truly yours,

(Signed) Walter G. Douglas
WALTER G. DOUGLAS

(Signed) Mose Gumble
MOSE GUMBLE

Accepted:

(Signed) Walter Donaldson
WALTER DONALDSON

Plaintiff's Exhibit 4

(Admitted at Page 101 of Record)

New York, May 15, 1928.

Mr. Walter Donaldson
1595 Broadway
New York City.

Dear Mr. Donaldson:

The following is our agreement:

1. You hereby agree to write and compose musical works for us exclusively for the period of five (5) years commencing with the date hereof.

2. In consideration of the execution and delivery of this agreement by you, we agree to issue and deliver to you one-third (⅓) of our entire capital stock, to wit, 33⅓ shares fully paid and non-assessable.

We also agree to pay you the following royalties:

A sum equal to ten percent (10%) of the retail price of all music written or composed by you, sold by us, subject to the proviso that your royalties shall in no event be less than three cents (3¢) for and upon each and every copy of sheet music of such musical works sold in the United States and Canada, and subject to the further proviso that with respect to production numbers your royalties shall in no event be less than eight cents (8¢) for and upon each and every copy of sheet music thereof sold in the United States and C nada.

You shall also receive fifty percent (50%) of all moneys collected by us from the mechanical reproduction of any such works in the United States and Canada.

You shall also receive one-half (½) of all moneys collected by us as foreign royalties whether because of the

publication of such works in foreign countries or because of their mechanical reproduction.

If you shall have any collaborators in any such works, we will arrange for and pay to such collaborators their compensation or royalty, such compensation or royalty to be paid out of the sums payable to you hereunder, but the amount of such compensation or royalty payable to such collaborators shall be subject to your approval.

In the case of production numbers, we shall arrange for and pay to the producer of the musical plays containing such production numbers, the compensation or royalty, if any, which may be payable to such producer on account of the publication or mechanical reproduction of such production numbers, such compensation or royalty to be paid out of the sums payable to you, but the amount of such compensation or royalty shall be subject to your approval.

3. We agree, during the term of this contract, to deposit in a special account to be known as the "Royalty Account", all royalties which have become payable to you during each calendar month, and you shall have the right to withdraw such royalties deposited in such account as and when you may desire so to do.

4. You shall have a drawing account against your royalties of Three Hundred ($300.) Dollars per week during the first six months of your employment, and of Five Hundred ($500.) Dollars per week during the balance of the five-year term hereof.

We shall have the right to deduct such drawings from any royalties that may have theretofore or that may thereafter accrue to you.

5. All publication and mechanical reproduction rights in your musical works written and composed during the

five-year term hereof, shall be and vest in us immediately upon the creation of such musical works by you, subject to the payment to you of the royalties above specified, and we shall have the right to secure copyright in our name in all such works.

6. We agree to print and publish in first-class style such of your musical works as we may deem suitable for publication and for which we believe there will be a public demand, and we agree to use our best efforts to introduce such musical works into the general market and to popularize and create a demand for the same.

Your signature at the foot hereof underneath the word "Accepted", will make this a binding agreement between us.

Yours very truly,

DONALDSON, DOUGLAS & GUMBLE, INC.

By WALTER G. DOUGLAS,
Treasurer.

ACCEPTED:

I hereby accept the above and agree to become bound thereby and to carry out and perform all the terms and conditions thereof on my part to be kept and performed.

WALTER DONALDSON L.S.

Plaintiff's Exhibit 5

(Admitted at Page 102 of Record)

New York, May 15, 1928.

Mr. Walter G. Douglas
1595 Broadway
New York City.

Dear Mr. Douglas:

The following is our agreement:

1. We hereby employ you, and you hereby enter into our employ, for a period of five (5) years from the date hereof, as business manager.

2. You agree to devote yourself exclusively to the rendition of your services to us.

3. We agree to pay you for your services the sum of Three Hundred ($300.) Dollars per week.

Your signature at the foot hereof underneath the word "Accepted", will make this a binding agreement between us.

Yours very truly,

Donaldson, Douglas & Gumble, Inc.

By Walter Donaldson
President

Accepted:

I hereby accept the above and agree to become bound thereby and to carry out and perform all the terms and conditions thereof on my part to be kept and performed.

Walter G. Douglas L.S.

Plaintiff's Exhibit 6

(Admitted at Page 103 of Record)

New York, May 15, 1928.

Mr. Mose Gumble
1595 Broadway
New York City.

Dear Mr. Gumble:

The following is our agreement:

1. We hereby employ you, and you hereby enter into our employ, for a period of five (5) years from the date hereof, as professional manager.

2. You agree to devote yourself exclusively to the rendition of your services to us.

3. We agree to pay you for your services the sum of Three Hundred ($300.) Dollars per week.

Your signature at the foot hereof underneath the word "Accepted", will make this a binding agreement between us.

Yours very truly,

Donaldson, Douglas & Gumble, Inc.

By Walter Donaldson
President

Accepted:

I hereby accept the above and agree to become bound thereby and to carry out and perform all the terms and conditions thereof on my part to be kept and performed.

Mose Gumble L.S.

Plaintiff's Exhibit 7

(Admitted at Page 103 of Record)

Excerpts

MEMORANDUM AGREEMENT made and entered into this 24th day of August, 1928, by and between Florenz Ziegfeld, Jr., of the City, County and State of New York, hereinafter referred to as the "Manager", party of the first part, and Walter Donaldson, of the same place, hereinafter referred to as the "Composer" and Gus Kahn, of the same place, hereinafter referred to as the "Lyricist", parties of the second part,

* * *

Whereas, the Composer and Lyricist are willing to write respectively the musical score and lyrics of the said proposed dramatico-musical play adapted from the said dramatic composition "The Nervous Wreck" and to grant to the Manager the exclusive right to the use of the said musical score and lyrics in connection with the said play throughout the world under the conditions hereinafter contained,

* * *

Eighth: In the event of the acceptance of the said music and lyrics by the Manager, the Manager shall have and receive the exclusive right to use the same in accordance with the terms of this agreement and for all times and for any and all purposes. . . .

* * *

Tenth: Composer and Lyricist covenant and agree that the said music and lyrics shall be drawn from original sources and/or the dramatic composition "The Nervous Wreck" and shall not infringe upon the rights or works of any other person, persons, firm or corporation and they do warrant that they will be the sole and exclusive owners of the right, license and privilege to authorize the Manager

to use the music and lyrics with all of the said purposes and that no other person, firm or corporation shall have the right to interfere in any wise in the full enjoyment and use by the Manager of the said music and lyrics. . . .

* * *

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

WALTER DONALDSON

GUS KAHN

FLORENZ ZIEGFELD, JR.

Plaintiff's Exhibit 9

(ADMITTED AT PAGE 106 OF RECORD)

Excerpts

MR. SAMUEL GOLDWYN,
729 Seventh Avenue,
New York, N.Y.

Dear Sir:

The following is our agreement:

1. We hereby grant, sell, assign and set over to you, forever, the entire motion picture and sound and talking motion picture rights (all such rights being hereinafter included and embraced in the expression "motion picture rights"), for the entire world, in and to the musical play entitled *"Whoopee"*, written as follows: Book by William Anthony McGuire, Lyrics by Gus Kahn and Music by Walter Donaldson (all hereinafter referred to as the

"Authors"), the title and theme thereof (including the book, lyrics and music and each and every other part thereof) exclusively, together with all of the benefits of the copyrights in such work and of all remedies for enforcing such copyrights with respect to such motion picture rights, and we hereby also grant, sell, assign and set over to you, forever, our entire right, title and interest in the motion picture rights, as that expression is herein used, in the dramatic composition entitled "THE NERVOUS WRECK", upon which "Whoopee" is based and in the story entitled "THE WRECK", upon which such dramatic composition "The Nervous Wreck" is based.

We hereby grant to you the exclusive right to make motion picture versions and sound and talking motion picture versions of such work (all such versions being hereinafter included and embraced in the expression "motion picture versions"), to adapt, arrange, change, transpose, add to and subtract from the said work and the title thereof to such extent as you may deem expedient, to use excerpts from such work for the titles, subtitles, text and dialogue of such motion picture versions, to publish, for the purpose of advertising and exploiting such motion picture versions, in such form as you may deem advisable, including its publication in newspapers, fan magazines and trade periodicals, a synopsis or story of such motion picture versions, not exceeding, however, ten thousand words in length, and to use excerpts from such work in heralds, programs, booklets, posters, lobby displays, press books and any and all other mediums of advertising and publicity whatsoever, and the exclusive unlimited and unrestricted right to produce, reproduce, distribute, exhibit and otherwise exploit and dispose of such motion picture versions, and to secure copyright and copyright registration therein in all countries of the world in your name or otherwise.

* * *

Plaintiff's Exhibit 9

2. We warrant that we are the sole owners of the motion picture rights in said work and have full right and authority to grant the rights hereby conveyed. We further warrant that the aforesaid work is original with the said Authors in all respects, that no incident therein contained and that no part thereof was taken from or based upon any other literary or dramatic work or any motion picture, or in any way infringes upon the copyright or the literary, dramatic or motion picture rights of any party whomsoever, except insofar as the same is based upon the above mentioned dramatic composition "The Nervous Wreck"; that such work has been duly copyrighted in the United States; . . . that the motion picture rights of such work have in no way been sold, mortgaged or otherise disposed of and are free and clear of any liens or claims whatsoever in favor of any party whomsoever; that the reproduction and exhibition of such work in the form of motion picture versions will not in any way infringe upon any rights of any party whomsoever; that we have done no act or thing that can in any way prevent or interfere with the full enjoyment by you of the rights hereby acquired.

We agree and guarantee to defend, indemnify and hold you harmless against any losses, damages, expenses or judgments which may be sustained or suffered by or secured against you by reason of any infringement of any copyright or any literary, dramatic or motion picture rights on account of any use which you may make of such work in the making of any motion picture versions thereof, the distribution, exhibition or other disposition of such motion picture versions, or the exercise or attempted exercise of any of the rights hereby granted, to the extent of our pro rata interest in the monies paid us under this agreement.

* * *

4. In case there shall be any renewals or extensions of the United States Copyright in such work or in any part thereof, then you shall be deemed to have acquired under

any and all such renewed or extended copyrights, all the rights in such work which have herein been granted, sold, assigned and set over to you, and if requested by you, we agree to execute or cause to be executed, any instruments that may be necessary, proper or expedient to establish the vesting in you of such rights during such renewed or extended period.

• • •

WILLIAM ANTHONY MCGUIRE (L.S.)

ALBERT LEWIS

GUS KAHN
By JOSEPH P. BICKERTON JR. (L.S.)

LEWIS & GORDON
By ALBERT LEWIS
MAX GORDON

WALTER DONALDSON
WALTER DOUGLAS atty (L.S.)

OWEN DAVIS (L.S.)
SAM H. HARRIS (L.S.)
ROBERT H. DAVIS (L.S.)

JULIA A. JACOBS
By ROBERT H. DAVIS
Attorney-in-Fact

ADELIA B. GILBERT
By ROBERT H. DAVIS
Attorney-in-Fact

W. A. M. PERSONNEL, INC.
By A. L. BERMAN
Treasurer

Approved
JOSEPH P. BICKERTON JR.

WALTER DONALDSON (L.S.)
FLORENZ ZEIGFELD
By JOSEPH P. BICKERTON JR. atty in fact
By STANLEY SHARPE atty in fact

Accepted:

• • •

SAMUEL GOLDWYN (L.S.)

Defendant's Exhibit EE

(ADMITTED AT PAGE 228, 294 OF RECORD)

Excerpts

THIS AGREEMENT, made and entered into this 8th day of April, 1928, by and between *Fox Film Corporation*, a New York corporation, party of the first part, *Donaldson, Douglas & Gumble, Inc.*, a New York corporation, party of the second part, *Walter Donaldson* and *Edgar Leslie*, both of the City of New York, parties of the third part, and *DeSylva Brown & Henderson, Inc.*, a New York corporation, party of the fourth part, . . . (1929 is the correct date of the agreement instead of the typographically-in-error 1928).

* * *

SECOND: The party of the first part hereby employs the parties of the third part and the parties of the third part, enter the employ of the party of the first part, to render their exclusive services to the party of the first part, as writers of lyrics, songs and musical compositions, for a term of twelve (12) weeks, beginning June 15, 1929, or not later than June 20, 1929, on which date the parties of the third part are to report at the studio of the party of the first part, at Los Angeles, California.

* * *

THIRD: The party of the first part shall pay to each of the parties of the third part, as compensation for the services to be rendered by each of them herein, the sum of Five Hundred ($500.) Dollars per week, during the term of said employment, provided, however, that the said salary shall not be paid during the inability or failure of the parties of the third part, or either of them, to perform, according to the terms and conditions hereof, the services contracted for herein.

* * *

Defendant's Exhibit EE

FIFTH: That the parties of the third part, shall during the term of the employment hereby created, devote their services exclusively to writing, composing and creating lyrics, songs and musical compositions, as the party of the first part shall direct, in accordance with the ideas of and at the times and places required by its duly authorized representatives, and that such services shall be rendered in a conscientious, artistic and efficient manner, to the best ability of the parties of the third part and each of them; and the character and type of said services and the manner of rendition thereof, are to be governed entirely by the party of the first part.

SIXTH: That the services of the parties of the third part herein contracted for are of a special, unique, unusual, extraordinary and intellectual nature, and of great and peculiar value to the party of the first part, and that their loss could not be reasonably or adequately compensated by pecuniary damages, and that the talents and services of the parties of the third part cannot be replaced by the party of the first part and the party of the first part is hereby given and granted the exclusive right and property in and to the services and in and to the use thereof. That the parties of the third part will not, during the term of the employment hereby created, engage with any other Producer of motion pictures or render any service or services of any kind or nature whatsoever, either for themselves or for and on account or benefit or to any person, firm or corporation, other than the party of the first part, either within or outside of business hours. In the event of a breach of this contract by the parties of the third part, or either of them, the party of the first

part shall be entitled to equitable relief by way of injunction or otherwise.

* * *

FOX FILM CORPORATION

By JACK G. LEO
Vice President

DONALDSON, DOUGLAS & GUMBLE, INC.

By WALTER G. DOUGLAS, Vice Pres.

WALTER DONALDSON (L.S.)

By WALTER DOUGLAS atty in fact

EDGAR LESLIE (L.S.)

By WALTER DOUGLAS atty in fact

DE SYLVA, BROWN & HENDERSON, INC.

By ROBERT [illegible]
President

Excerpts From Testimony

CHARLES SCHWARTZ, called as a witness by the plaintiff, being first duly sworn, testified as follows:

(R. 135-137) *Direct Examination by Mr. Dreyer*

Q. Did you represent Samuel Goldwyn in connection with the purchase by him of motion picture synchronization rights of a play entitled Whoopee? A. I may have. We represented Mr. Goldwyn generally and the probabilities are I acted for him in that connection.

Q. I show you Plaintiff's Exhibit 9 and ask you if you drew this document for Mr. Goldwyn? A. I don't see my handwriting on it, but I may have.

I may have represented him on this matter, but we had a staff of men in the office and it may be one of the other men took care of this. This is 1929, over 35 years ago, and it is pretty hard to remember.

Q. I show you a copy of a letter and ask you—

The Court: Mark it, please.

(Plaintiff's Exhibit 13 marked for identification.)

Q. Mr. Schwartz, I show you Plaintiff's Exhibit 13 for identification and ask you if this refreshes your recollection as to your representation of Mr. Goldwyn and the drawing of that contract, No. 9? A. I would think that I dictated this letter, my initials are on the side.

The Court: Listen to the question, Mr. Schwartz. Strike the answer.

Having read that letter, is your recollection refreshed as to whether or not you prepared that agreement? A. I would think so, yes, sir.

• • •

Q. At that time, were you still representing Donaldson, Douglas & Gumble, Mr. Schwartz?

* * *

A. I don't recall, it is so many years ago, over 35 or 36 years ago. I don't remember whether we did represent Donaldson, Douglas & Gumble at that time or not.

Q. You don't remember? A. I don't remember.

CHARLES SCHWARTZ, called as a witness for the defense, testified as follows:

Direct examination by Mr. Chopnick:

* * *

(R. 141) Q. Do you remember what the three gentlemen had indicated to you as the arrangements among themselves? A. I have no independent recollection, except in so far as my files show what the arrangement was. I have my file with me. If you would like to see it, you may. I have shown it to you and the other side before.

* * *

(R. 142) Q. You were asked to prepare an agreement which was in the nature of what is called a promotional preincorporation agreement. A. Yes.

Q. You did prepare a draft of that agreement. A. Yes, sir.

Q. Did you then have a meeting with the three gentlemen on your draft? A. I don't recall any meeting, but there must have been some discussions about it because there were changes made in the draft.

* * *

(R. 147) Q. Were you advised as to whether their services were to be exclusive? A. According to the papers, yes.

Charles Schwartz—for Defendant—Redirect

Q. During—

The Witness: Your Honor, I must state that I have no independent recollection.

* * *

(R. 154) The Court: There is no question from the document that Gumble and Douglas were labeled employees. Would you consider Donaldson an employee of this corporation?

The Witness: Well, I have no recollection, once again, as to what the parties intended. As I read the document, what he wrote belonged to the company, so the ordinary arrangement would be that he would be an employee. The contract says that the publication, as I remember the document, the publication and the mechanical rights belong to the enterprise. He made an assignment forever. They all belong—

* * *

Redirect examination by Mr. Chopnick:

(R. 162) Q. Which may explain the absence of the word "renewal"? A. I don't know, I don't know what was in my mind at the time.